In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 724

ANTHONY MIRRA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 379 F.2d 782. The opinion of the district court is reported at 255 F.Supp. 570.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 1967. By order of Mr. Justice Harlan, the time for filing a petition for a writ of certiorari was extended to and including October 13, 1967, and

the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether petitioner's motion to vacate sentence, based upon a ground urged at trial but abandoned upon appeal, was properly denied without a hearing.

2. Whether the judge who presided at petitioner's trial properly refused to disqualify himself from ruling on the motion to vacate sentence.

STATEMENT

After a trial in the United States District Court for the Southern District of New York, petitioner was convicted of narcotics violations, and was sentenced on July 10, 1962, to imprisonment for twenty years. His conviction was affirmed. *United States* v. *Bentvena*, 319 F.2d 916 (C.A. 2), certiorari denied, *sub nom. Ormento* v. *United States*, 375 U.S. 940. A conviction for contempt based on his conduct at the trial (including the act of throwing a chair at the prosecutor) was also upheld. 304 F.2d 883, certiorari denied, 371 U.S. 927. On January 12, 1966, petitioner moved to vacate his sentence, alleging that for two days during the trial, June 4th and 5th, he had been mentally incompetent to assist in his own defense and that he had been unconstitutionally denied his request for a psychiatric examination at that time (R. 1-55).[1]

[1] "R." refers to the record filed by petitioner, "G.A." to the government appendix in the court below, lodged by the government.

Petitioner also filed a motion to disqualify the trial judge from considering the motion to vacate sentence, alleging that the judge was of necessity a material witness and that the judge had previously shown an intense personal bias and prejudice against petitioner (R. 57-64). In a detailed opinion the district court denied the motions without a hearing. The court of appeals affirmed.

At the trial petitioner testified in his own behalf, contradicting in detail the testimony of a government witness (G.A. 2-31). On June 4th, during cross-examination, he gave an indefinite answer to a question about a prior conviction. When the Assistant United States Attorney commenced reading from the record of the conviction, petitioner threw the witness chair at the attorney, narrowly missing him (G.A. 52-55).

Following a recess, petitioner's trial counsel reported that petitioner complained of being sick and that he was incoherently repeating, "They are trying to murder me." Counsel stated that he could not communicate with his client and asked the court to commit petitioner to a hospital for psychiatric examination. The court denied the request (G.A. 57-58). Following a stipulation as to the earlier sentence, government counsel stated he had no further cross-examination and petitioner's counsel asked for and was granted leave to defer re-direct examination (G.A. 58-59). Some days later petitioner testified extensively on redirect (G.A. 92-105).

On June 4, subsequent to the chair-throwing incident and after a defense witness had testified, petitioner's counsel reported that he had been unable to

consult with petitioner who appeared to be asleep during the noon-hour. Later, after counsel was directed to consult with petitioner outside the courtroom, counsel reported that at the noon recess the nurse had given petitioner two pills which contained phenobarbital (G.A. 63-65). On the following day, June 5, the court stated that after the trial was completed it would hear testimony as to the medication which petitioner had received (G.A. 77). Counsel reported that petitioner had told him to inform the court that he had received three pills that morning and that he was in a fog (G.A. 82).

At a hearing conducted after the trial, the nurse in the first-aid room testified that on June 4 she had given petitioner two pills containing one-half grain of phenobarbital (G.A. 115). A physician testified that one-half grain of phenobarbital would not interfere with a person's ability to understand testimony or the nature of the proceedings at trial (G.A. 117-118, 123). He stated that the drug is used to lessen nervous irritability (G.A. 121) and that the normal dose to induce sleep is a grain and a half, although more might be necessary for a very nervous person (G.A. 119). Petitioner testified that the nurse gave him the pills when he complained about not feeling well. He said he began to get sleepy about a half hour after he received the pills and remained sleepy "[f]or a few hours, a couple of hours" (G.A. 123-125).

Following the trial, at the sentencing on the contempt proceeding, petitioner said he was a hothead and was sorry for the chair-throwing incident (G.A. 113). At sentencing on the main charge, petitioner again said

that he was sorry about his conduct during the trial and again blamed it on being hot-headed (G.A. 127). When he pleaded guilty to a charge of assault based on the chair-throwing incident he acknowledged that he had discussed the incident with his attorney and had given him all the facts (G.A. 134-135). He again apologized for his conduct (G.A. 144).

2. Petitioner's motion to vacate sentence was based on affidavits submitted by petitioner himself, by his present attorney, and by Dr. Max Helfand, a psychiatrist.

Petitioner stated in his affidavit (R. 6-7):

> I hereby aver that I do not now have and I have never had any recollection of having thrown a chair as stated in the record of my trial; or of the happenings or of anything going on around me or of my own state of mind or awareness of anything from the time of my cross-examination when the Prosecutor asked me something about a crime for which I had been previously convicted until the Chief Marshal whose name I believe was Foley later told me in the "Bullpen" that a nurse had given me a pill. The remainder of that whole day of June 4, 1962 is very vague in my memory. The following day is clearer but still vague in my memory.[2]

He further stated that for a considerable period before June 4 he had been having constant headaches and was tense and quarrelsome; that he had had two

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[2] These assertions were repeated in substance by petitioner in his affidavit supporting the motion to disqualify the judge (R. 69).

accidents causing injuries to his head when he was a child; and that he had been rejected as emotionally unstable by the Merchant Marine in 1944, but accepted for service by the Army in October 1954 (R. 7-8).

Dr. Helfand, who based his opinion on the trial transcript covering petitioner's testimony, the post-trial testimony concerning medication received by petitioner, the prison medical records, and conferences with petitioner's present counsel (R. 10-11), stated that his conclusion was that, on June 4, 1962, and immediately thereafter, petitioner, as a sociopathic personality "might have been subject to outbursts of temporary psychotic episodes which would be or might be characterized by extreme hostility and outbursts of sadistic behavior." He further concluded that, without a full psychiatric examination at the time, "no legally proper conclusion from a sound medical standpoint could be made as to Mirra's fitness to stand trial" and that had there been an examination at the time the conclusion of the examiner might well have been that petitioner was not mentally fit to stand trial (R. 11-12).

ARGUMENT

Petitioner's motion was properly denied without a hearing. There is nothing in petitioner's moving papers to indicate, even *prima facie*, that petitioner was actually incompetent during the two days in question. The trial record shows that during that period he was able to consult with counsel and that both before and after the period in question he was able to testify

rationally. The psychiatric opinion offered was only that a prompt psychiatric examination on the days in question might have shown that petitioner was then incompetent. The psychiatrist had not talked with petitioner's trial counsel and had apparently assumed the truth of petitioner's statement that he had no recollection of the chair-throwing incident. That petitioner did actually have a recollection of that incident shortly after its occurence is shown by his own statements at the sentencings on the main charge, the contempt and the assault. Even assuming that petitioner was drowsy during the period that testimony was given by two witnesses for the defense (contrary to the conclusion of the trial judge which was based on his own observation of petitioner at trial), this hardly amounts to mental incompetence. Nor can there be any claim that the drowsiness deprived petitioner of the ability to defend himself against the charges for which he was on trial; the witnesses who testified during the period in question were friendly to the defense and gave testimony which did not involve petitioner. In these circumstances, the courts below properly held that petitioner had made no showing which would present a basis for collateral attack on a judgment which had been fully reviewed on appeal.

2. The court properly overruled the motion to disqualify the trial judge on the grounds that he would necessarily be a witness on the motion and that he was biased and prejudiced. Since there were no allegations requiring a hearing, there would be no occa-

sion for the judge to be a witness.[3] The mere possibility that a judge might be called as a witness is insufficient to disqualify him. *United States* v. *Hughes*, 325 F.2d 789, 793 (C.A. 2), certiorari denied, 377 U.S. 907.

The charge of bias and prejudice is unsupported. On direct appeal, the court of appeals considered in detail the incidents relied upon to show that the judge's attitude prejudiced the jury and found an absence of personal hostility toward the defendants and that the court's rulings were reasonable. *United States* v. *Bentvena*, 319 F.2d at 932-933, certiorari denied, 375 U.S. 940. The court concluded (p. 933):

> We have described sufficiently the outrageous conduct of the defendants at this trial. We find that the trial judge, notwithstanding this harassment, maintained an impartial attitude and did all in his power to safeguard the rights of the defendants and to minimize the effects of these outbursts.

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[3] One of the purposes of the statute was to relieve judges having no antecedent knowledge of the case from the onerous task of delving into an unfamiliar record. *United States* v. *Hayman*, 342 U.S. 205; *United States* v. *Smith*, 337 F.2d 49, 53 (C.A. 4), certiorari denied, 381 U.S. 916.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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